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A crisis of constitutional democracy in post-Communist Europe: "Lands in-between" democracy and authoritarianism

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Just ten years after their triumphant "return to Europe" in 2004, Central and Eastern European (CEE) countries are facing a very serious crisis of constitutional democracy. This crisis—which coincides with the Eurozone crisis—has a specific origin. This article will show that the rule-of-law institutions in these countries are less robust than in Western countries. In other words, Western democracies can cope more successfully with various attacks on their liberal institutions because their courts, media, human rights organizations, and ombudsmen have a longer and better-developed tradition of independence and professionalism. Conversely, where such institutions are weak and underdeveloped, as is the case in CEE, there is always the potential danger of a drift towards authoritarianism and "illiberal democracy." As examples from Hungary and Slovenia show, even the most advanced CEE democracies are not immune to this backsliding. In a relatively short period of time, both countries regressed from consolidated democracies into two distinct forms of semi-authoritarian and diminished democratic regimes. Particular worrying is the ease with which this regression occurred.

> Although there is a strong desire for freedom in the countries of Eastern Europe, there is no democratic tradition, so that the risk of anarchy and chaos continues to exist. Demagoguery and populism are rampant. *We are the illegitimate children, the bastards of communism*. It shaped our mentality.
>
> Adam Michnik, *Interview,* Der Spiegel, July 31, 2013
> (emphasis added)

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1. Introduction

After the fall of the Berlin Wall and the collapse of Communism, many Central and Eastern European (CEE) countries managed to "return to Europe." According to Freedom House's *Nations in Transit* 2013 report, eight of these countries are "consolidated democracies." Only three of the eleven EU member states from the region (Bulgaria, Romania, and Croatia) are not a part of this group and, together with three other ex-Yugoslav republics, form a second group of "semi-consolidated democracies."[1] For many observers, the "return to Europe" signaled the ultimate victory of democracy and rule of law over the legacy of totalitarianism in these countries. As Jan Zielonka argues in his work *Europe as Empire*, the new EU member states may not exactly look like the old ones, but they nonetheless belong to the same broad category of democratic and liberal states and societies.[2]

In contrast to this optimistic view, more cautious scholars argue that "democracies by their very nature are never definitely established."[3] History is not over yet, and the *Nations in Transit* 2012 report, *Fragile Frontier: Democracy's Growing Vulnerability in Central and Southeastern Europe*, came to some alarming conclusions. The findings of the report show a clear backsliding in key governance institutions across the region in the last five years. Six of the ten EU member states in the region (Hungary, Bulgaria, the Czech Republic, Lithuania, Romania, and Slovakia) have experienced net declines over the past five years. As far as other countries in the region are concerned, the *Nations in Transit* report documented "an antidemocratic trend," a "democratic decline," "which raises real doubts about the prospects for widening the circle of democratic states in Europe."[4] Equally alarming is the Introduction to a special issue of a leading academic journal:

> The countries of Central and Eastern Europe were proclaimed to be consolidated democracies when they joined the European Union (EU) in 2004–2007. At that time, they seemed to have workable constitutions, administrations, and markets. However, history is moving fast, and new democracies are seen as particularly vulnerable and susceptible to a dictatorial turn.[5]

Hungary recently adopted a new Constitution that directly dismantles basic checks and balances, entrenches a deeply problematic illiberal political order, and undermines some of the basic principles of the EU political constitution.[6] For the first time in the history of the EU, the EU Commission is contemplating the use of sanctions against Hungary.[7] A new government in Romania took rapid steps to consolidate its power over state

1 Freedom House, *Nations in Transit 2013: Authoritarian Aggression and the Pressures of Austerity* (2013), *available at*: http://www.freedomhouse.org/report/nations-transit/nations-transit-2013.

2 Jan Zielonka, Europe as Empire: The Nature of the Enlarged European Union 43 (2006).

3 Jacques Rupnik & Jan Zielonka, *Introduction: The State of Democracy 20 Years on: Domestic and External Factors*, 27(1) E. Eur. Pol. & Societies & Cultures 3, 21 (2013).

4 Freedom House, *Nations in Transit 2012: Fragile Frontier: Democracy's Growing Vulnerability in Central and Southeastern Europe* (2012), *available at* http://www.freedomhouse.org/report/nations-transit/nations-transit-2012.

5 Rupnik & Zielonka, *supra* note 3, at 3.

6 Jan Werner Müller, *Defending Democracy Within the EU*, 24(2) J. Democracy 138, 139–140 (2013).

7 Kim Lane Scheppele, *In Praise of the Tavares Report*, *available at* http://hungarianspectrum.wordpress.com/2013/07/03/kim-lane-scheppele-in-praise-of-the-tavares-report/.

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institutions, triggering a constitutional crisis which was labeled a "quiet coup d'état" by the international press.[8] Only after a resolute response from the EU did the Romanian government back down on several crucial issues that threatened to unravel the rule of law in the country.[9] In Bulgaria, the institutionalization of cronyism, the subversion of stable normative frameworks, and stalled state-building are all leading to "post accession hooliganism,"[10] which is further weakening an already "frustrated and disillusioned democracy."[11] Slovenia, one of the "success stories" of the transition, is experiencing its biggest constitutional and political crisis since its independence in 1991. The Slovenian constitutional model, which is best described as a gradual and homegrown transformation from Communism to a "neo-corporatist" democracy, and has been hailed as the most "balanced and inclusive" form of transition,[12] is currently facing a simultaneous economic and political crisis.[13] The capture of the state by various political and informal groups has progressed to such a dramatic extent that it is undermining the independence and credibility of almost all rule-of-law institutions in the country, with the exception of the Constitutional Court. Even the Czech Republic is not completely exempt from this trend.[14] It seems that only Poland[15] has so far been able to resist the lure of authoritarianism.

As these examples of democratic fatigue, regression, and backsliding into various forms of constitutional authoritarianism in Central and Eastern Europe show, the "return to Europe" is not yet complete. Jacques Rupnik and Jan Zielonka offer the poignant observation that "the disturbing question is the ease with which consolidated democracies such as Hungary can experience 'democratic regression', reminding us that democracies by their very nature are never 'definitely established'."[16] While there has been significant progress in the development of "electoral democracy" in the region, "liberal democracy" still remains fragile and weak. Here, liberal democracy is understood as a political system marked not only by free and fair elections, but also by the rule of law, the separation of powers and the protection of basic freedoms.[17] Moreover, the legal institutions of liberal democracy in the CEE countries

[8] Rupnik & Zielonka, *supra* note 3, at 3.

[9] Grigore Pop-Eleches, *Learning from Mistakes: Romanian Democracy and the Hungarian Precedent*, EPS Newsletter (Winter 2013) at 10.

[10] Venelin I. Ganev, *Post-Accession Hooliganism: Democratic Governance in Bulgaria and Romania After 2007*, 27(1) E. Eur. Pol. & Societies & Cultures 26, 39 (2013).

[11] Daniel Smilov, *Bulgaria: The Discontents and Frustrations of a Newly Consolidated Democracy*, *in* Democratization and the European Union: Comparing Central and Eastern European Post-Communist Countries 96, 96 (Leonardo Morlino & Wojciech Sadurski eds., 2010).

[12] Dorothee Bohle & Béla Greskovits, *Capitalist Diversity in Eastern Europe*, 8(2) Econ. Sociology 3, 4 (2007).

[13] Igor Guardiancich, *The Uncertain Future of Slovenian Exceptionalism*, 26(2) E. Eur. Pol. & Societies & Cultures 380 (2012).

[14] Rupnik & Zielonka, *supra* note 3, at 3–4.

[15] Grzegorz Ekiert, *The Illiberal Challenges in Post-Communist Europe*, 8(2) Taiwan J. Democracy 63 (2012); Mitchell A. Orenstein, *Poland: From Tragedy to Triumph*, 93(1) Foreign Affairs 23 (2014).

[16] Rupnik & Zielonka, *supra* note 3, at 21.

[17] Andrew Heywood describes liberal democracy as a form of democratic rule "that balances the principle of limited government against the ideal of popular consent." See Andrew Heywood, Politics 30 (2002). In a similar vein, Michel Rosenfeld describes the rule of law, the protection of fundamental rights and limited government as the three "'essential characteristics' of constitutional democracy." Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. Cal. L. Rev. 1307, 1307 (2001). Some authors use liberal democracy and constitutional liberalism interchangeably, *see* Fareed Zakaria, *The Rise of Illiberal Democracy*, 76(6) Foreign Affairs, 22, 22–23 (1997).

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significantly differ from those of their Western European counterparts. In the façade of harmonized legal rules transposed from various EU legal sources, there have begun to appear cracks, exposing the fragility of constitutional democracy in the CEE countries. Several recent studies emphasize this aspect and argue that formal democratic institutions operate "in the shadow of informal networks" which undermine formal law and institutions. Such "hybrid" forms of constitutionalism have also significantly contributed to the crisis of constitutional democracy in the region.[18]

As a consequence, CEE countries are once again displaying certain features of the "lands in between" which call attention to their constantly precarious and indeterminate location on the political map of Europe. *Zwischen-Europa*, as some interwar German writers referred to this part of Europe, lies in the territory between the West and the Russian East and is said to have been the "unfinished part of Europe" for most of the twentieth century.[19] Its political and legal institutions were similarly "caught" between the democratic West and the authoritarian East. As such, the "lands in between" should be an interesting case study for new literature on "competitive authoritarianism," which argues that between constitutional democracy and authoritarian rule there are many intermediate and hybrid forms of "constitutional authoritarianism."[20] Where do CEE models of constitutionalism lie on this continuum? In this article, I argue that some of these models represent a distinct form of constitutional democracy that is neither pure democracy nor full-fledged authoritarianism, but rather a "diminished" form of democracy,[21] pervaded by strong authoritarian elements. Although they are still considered to be "consolidated" or semi-consolidated democracies, many CEE countries exhibit strong features of authoritarian constitutionalism; they thus represent, in the words of Mark Tushnet, "a promising candidate" for the examination of a potentially distinctive form of constitutionalism.[22]

The discrepancy between the form and substance of liberal democracy in this part of the world should come as no surprise. Ivan Berend, a leading historian of the region, argues that Central and Eastern Europe is home to a continuing pattern of "forms without substance,"[23] and has pointed out a series of unsuccessful attempts to emulate Western European democratic institutions which often resulted in legal forms devoid of real substance. Those who expected that a decade of "EU accession" would lead to an irreversible break with the totalitarian past were simply naïve. They

[18] Rupnik & Zielonka, *supra* note 3, at 2–13; Paul Blokker, New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia (2013); Danijela Dolenec, Democratic Institutions and Authoritarian Rule in South-East Europe (2013).

[19] Ivan T. Berend, *What is Central Europe?*, 8(4) Eur. J. Soc. Theory 401, 402–403 (2005).

[20] Steven Levitsky & Lucian A. Way, *The Rise of Competitive Authoritarianism*, 13(2) J. Democracy 51, 51–52 (2002). For constitutional aspects, *see* Tom Ginsburg & Alberto Simpser, *Introduction: Constitutions in Authoritarian Regimes*, in Constitutions in Authoritarian Regimes 1–19 (Tom Ginsburg & Alberto Simpser eds., 2014).

[21] On the notion of diminished democracy, *see* David Collier & Steven Levitsky, *Democracy without Adjectives: Conceptual Innovation in Comparative Research*, 49 World Politics 437 (1997).

[22] Mark Tushnet, *Authoritarian Constitutionalism*, Harvard Public Law Working Paper No. 13–47 (2013), at 110.

[23] Ivan T. Berend, Decades of Crisis: Central and Eastern Europe Before World War II at 10, 300–301 (1998).

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forgot that institutions of liberal democracy cannot be created overnight. Developing liberal democracy requires not only a longer time frame, but also continuous support from citizens. This last aspect has proven to be particularly troublesome, and has, to a large extent, been responsible for the "partial" democratic consolidation in the region.

Following Thomas Carothers's influential critique of "sequentialism"[24] and more recent work on the relationship between democratization and state consolidation,[25] I argue that only greater democratization offers real hope for the further development of liberal democracy in the region. Even if it is true that some authoritarian regimes based on the rule of law have proven capable of generating economic growth and prosperity, I argue that for a variety of reasons the CEE countries cannot follow this East-Asian approach to development. On the contrary, their problems can be solved only by achieving stronger democratic support for liberal institutions.

Section 2 traces the origins and patterns of democratic and constitutional regression in the region. It focuses on the two "front-runners" in the transition process, Hungary and Slovenia, countries already considered by many to be "consolidated democracies." The ease with which democratic regression has occurred in these two countries in many ways calls into question the supposed sharp divide between the Central European "success stories" and other, more problematic countries from the Balkans and further east.[26] Section 3 looks at the causes of the crisis of constitutional democracy in these countries. It tries to determine whether these crises are only "temporary" and primarily caused by so-called post-enlargement fatigue intensified by the negative effects of the Eurozone economic crisis, or more "structural" and likely to endure. Furthermore, it examines whether they represent a specific CEE pattern of democratic backsliding or belong to a worldwide trend of "democratic recession."[27] Section 4 considers possible solutions to the current constitutional crises in post-Communist Europe by situating the constitutional crises in the broader context of contemporary debates about the proper role of legal institutions in political and economic development, i.e., in the field of law and development. A central argument here is that an elitist, court-centered, and executive-driven process of democratization has to be complemented by more inclusive forms of democratic constitutionalism. The article concludes with a simple but often neglected insight about the relationship between democracy, liberalism, and the rule of law: Liberalism and democracy coexist in contemporary liberal democracies. Modern political thinkers have always debated whether there is a tension—some would call it a contradiction—between the two. Nevertheless, as Norberto Bobbio argues in *Liberalism and Democracy*, "the development of democracy has over time become the principal tool for the defence of rights to liberty."[28]

[24] Thomas Carothers, *The "Sequencing" Fallacy*, 18(1) J. Democracy 12 (2007).

[25] Giovanni Carbone & Vincenzo Memoli, *Does Democratization Foster State Consolidation? Democratic Rule, Political Order, and Administrative Capacity*, 28(1) Governance 5 (2015).

[26] *See, e.g.*, Grzegorz Ekiert, Jan Kubik, & Milada Anna Vachudova, *Democracy in the Post-Communist World: An Unending Quest?*, 21(1) E. Eur. Pol. & Societies 7 (2007).

[27] Larry Diamond, *Why Democracies Survive*, 22(1) J. Democracy 17, 19–23 (2011).

[28] Norberto Bobbio, Liberalism and Democracy 39 (1990).

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2. Backsliding into constitutional authoritarianism or diminished forms of democracy in Central and Eastern Europe?

2.1. Central European "success stories"

Hungary and Slovenia were until very recently among the most successful transition countries in the region. As such, a number of common features can be found in the transition processes in these two countries. With relatively open economies during the final years of socialism, these two countries had a much better starting position than other transition economies. Moreover, the brutality of the Communist regime in these two countries, particularly after the mid-1950s, was much less pronounced than in East Germany or Czechoslovakia, for example, and greatly contributed to the gradualism in political reforms. In a relatively short period of time, both countries became known as Central European "success stories." During the past two decades, they have improved both their economic growth and the quality of their institutions. As far as the rule of law is concerned, Slovenia and Hungary were top performers among CEE countries, together with the Czech Republic and Estonia. In Slovenia and Hungary, the constitutional courts emerged quite early as the most powerful institutions, along with Parliament and the executive. The activism and vigilance shown by both courts in the protection of constitutional rights were unparalleled in the region. Similarities can even be found in the design of the parliamentary systems in the two countries. Both countries opted for a strong parliamentary model with a formally ceremonial role for the president. Furthermore, the removal of the executive requires a "constructive vote of no confidence" in both countries. This was borrowed from the German Constitution and is intended to stabilize the executive.

However, there are also many crucial differences between the two countries. After the collapse of Communism, they opted for two quite different economic paradigms. While Slovenia followed a path of gradual economic reforms, in Hungary, privatization and the opening of the economy were more radical. From the perspective of the West, Slovenia, although a political front-runner, has always been an economic laggard. Whereas Hungary was the main recipient of international foreign investment in the region, Slovenia remained quite closed to foreign investment. Hungarian banks and enterprises, which were formerly state-owned, were almost completely privatized. In contrast, the share of state ownership in the Slovenian economy still remains among the largest in Europe. Another difference is that, whereas Slovenia was ruled by the same political bloc of left-centrist parties for most of the transition, there were regular political turnovers in Hungary. Nevertheless, both countries successfully joined the EU in 2004 and also became respected member states of international organizations such as the Council of Europe, the North Atlantic Treaty Organization (NATO), and the Organization for Economic Co-operation and Development (OECD).

Two different patterns of democratic regression emerged in Hungary and Slovenia. Although both are successful transition countries, in a relatively short period of time they have regressed into two different forms of authoritarian rule. While Hungary is

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an example of a "constitutional revolution" leading to the semi-authoritarian rule of a single party (the Fidesz party), Slovenia provides an example of "state capture,"[29] meaning that political elites indirectly control the country through various informal networks and practices.

2.2. The Hungarian constitutional revolution

The Fidesz government achieved a fundamental revision of the rules of the constitutional and political order in Hungary. In only five years (from 2010 to 2015) it managed to transform Hungary from one of the success stories of the transition from socialism to democracy into a semi-authoritarian regime based on an illiberal constitutional order by systematically dismantling checks and balances and thereby undermining the rule of law. The novelty and irony of the Hungarian slide into authoritarianism is that it was achieved entirely through legal means. Due to its two-thirds majority in the Hungarian unicameral parliament (the Diet), Fidesz faced few obstacles in achieving this "constitutional revolution."[30] As Erin Jenne and Cass Mudde argue,[31] Hungary thus represents a politically distinctive case of authoritarianism. Generally, authoritarian leaders undermine democratic institutions by not respecting the rule of law; Hungary, on the other hand, has managed to undermine the rule of law by changing the legal rules, i.e., the Constitution. Such a "constitutional revolution" produced a nominally democratic constitution; as Bánkuti, Halmai, and Scheppele argue, Hungary "can no longer be described substantively as a republican state governed by the rule of law."[32] The major "deficiency" of the new constitutional structure is that it vests so much power in the centralized executive that there exist no real checks and balances to restrain this power.[33] Moreover, because the new Hungarian Constitution properly guarantees "neither fundamental rights nor checks and balances," which is the core function of modern constitutions, it is also "unconstitutional."[34]

As Scheppele has shown, the Fidesz government strategically changed the rules of the game as set by the old Hungarian Constitution of 1949, which was still in force, although its content had been changed completely in 1989.[35] In one of its first constitutional amendments, the new government removed Article 24(5) of the old Constitution, which required a four-fifths vote in Parliament to approve the rules for drafting a new constitution. What followed was a series of constitutional amendments

[29] For state capture in general in CEE, *see* Abby Innes, *The Political Economy of State Capture in Central Europe*, 52(1) J. Comm. Mkt Stud. 88 (2014).

[30] Kim Lane Scheppele, *Hungary's Constitutional Revolution*, Conscience of a Liberal blog (Dec. 19, 2011), *available at* http://krugman.blogs.nytimes.com/2011/12/19/hungarys-constitutional-revolution.

[31] Erin K. Jenne & Cass Mudde, *Can Outsiders Help?*, 23(3) J. Democracy 147, 148 (2012).

[32] Miklós Bánkuti, Gábor Halmai, & Kim Lane Scheppele, *From Separation of Powers to a Government Without Checks: Hungary's Old and New Constitution*, *in* Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law 268 (Gäbor Attila Töth, ed., 2012).

[33] *Id.* at 268.

[34] Kim Lane Scheppele, *The Unconsitutional Constitution*, The Conscience of a Liberal blog (Jan. 12, 2012), *available at* http://krugman.blogs.nytimes.com/2012/01/02/the-unconstitutional-constitution/#more-27941.

[35] For an overview of these changes, *see* Kriszta Kovács & Gabor Attila Tóth, *Hungary's Constitutional Transformation*, 7(2) Eur. Const. L. Rev. 183, 188–195 (2011).

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that changed the rules regulating the Constitutional Court, the referendum process, and the authority in charge of media control. The most important of these was the amendment which changed the rules for nominating Constitutional Court judges so that Fidesz could use its two-thirds majority to nominate its own candidates. As Bánkuti et al. argue, these actions "effectively created an opening through which the Fidesz government could then push a new constitution without challenge."[36]

In less than a year, the Parliament adopted a new constitution, which became valid on January 1, 2012. The new constitution, called the "Szájer Constitution" after a Fidesz European Parliament member who headed the committee that had proposed the new constitution, contains several provisions that radically undermine basic checks and balances of the old constitution. Access to the Constitutional Court was radically limited, and the old system of *actio popularis*, which allowed anyone to bring a case before the Court, was replaced with the German model of constitutional complaint (*Verfassungsbeschwerde*). By lowering the retirement age for ordinary judges from 70 to 62, the government managed to remove almost all of the courts' presidents. The legislation on the judiciary established a new National Judicial Office with the power to replace the retiring judges and name new ones.

In its next step, the government weakened the independence and autonomy of other important bodies with controlling functions. The former system of four separate and independent ombudsmen was replaced with a "parliamentary commissioner for human rights," and the former data protection ombudsman was transformed from an independent institution into a quasi-governmental office. [37]

Last but not least, on March 11, 2013, the Hungarian Parliament adopted the so-called "Fourth Amendment,"[38] an amalgam of various constitutional provisions that sought to limit the independence of the judiciary, bring universities under even greater governmental control, open the door to political prosecution, criminalize homelessness, make the recognition of religious groups dependent on their cooperation with the government, and weaken human rights guarantees across the board. However, the most problematic amendments are those found in Articles 12 and 19, which drastically limit the jurisdiction of the Constitutional Court, one of the last bastions of the rule of law in Hungary.

While several authors agree that the new constitutional order undermines the rule of law by displacing an independent judiciary and other independent institutions, and that it removes most of the checks and balances needed in a system of liberal democracy, there is less agreement on how to define such a new constitutional order.[39]

[36] Miklós Bánkuti, Gábor Halmai, & Kim Lane Scheppele, *Disabling the Constitution*, 23(3) J. Democracy 138, 141 (2012).

[37] *Id.* at 142.

[38] The "Fourth Amendment" represents the fourth set of amendments to the Hungarian Constitution since its entry into force in 2011. *See* Fourth Amendment to Hungary's Fundamental Law, Office of the Parliament, Doc. No. T/9929, Budapest (Feb. 8, 2013), *available at* http://lapa.princeton.edu/hosteddocs/hungary/Fourth%20Amendment%20to%20the%20FL%20-Eng%20Corrected.pdf.

[39] As Martin Krygier argues, the term "one party dominant democracy" offers a best description of the new Hungarian constitutional order. *See* Martin Krygier, *What About the Rule of Law?*, 7 S. Afr. Const. Ct. Rev. 74 (2014).

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Whether it should be called a new illiberal regime, new authoritarianism, a Putin-style guided democracy, etc., is perhaps less important. Rupnik, for example, argues that Hungary is not a full-blown authoritarian regime like Lukashenko's Belarus, and that it is not clear whether it represents a "diminished form of authoritarianism" or a "diminished form of democracy."[40] Rupnik also sees a worrisome resemblance between Orbán's rhetoric and the pre-Communist authoritarian regime of Miklós Horthy. Key features of these pre-Communist traditions include strong anti-Semitism, anti-Bolshevism, and an obsession with the Trianon trauma—a result of the Treaty of Trianon of 1920, which formally ended World War I for Hungary and cost it more than two-thirds of its territory and a third of its population. Imre Kertész, a Nobel laureate, thinks that there are many parallels between the 1930s and the present situation. Kim Lane Scheppele offers another poignant observation on the current Hungarian political situation: the Fidesz government does not jail its opponents, it does not ban free travel, but it does punish political dissent, fire members of the political opposition from state-sector jobs, and intimidate the families of critical journalists. Even if it is not yet a full-blown authoritarian regime, the negative effects of the new constitutional order are real and show strong signs of a slide into authoritarianism.[41]

2.3. Slovenia: from success story to state capture

During the accession process (1998–2004) Slovenia gained the reputation of a "good pupil." It was known for its deference to suggestions by international organizations and for its largely uncritical adoption of their reform templates. Here, the EU played the most prominent role, particularly during the accession period. Hundreds of pieces of legislation were introduced or changed during this period under the rubric of the harmonization of Slovenian law with the "acquis." This was largely, though not exclusively, done to placate the EU, but after the accession (2004), it significantly contributed to the shallow "Europeanization" of EU norms. It created a Slovenian version of "Potemkin" harmonization, characterized by the coexistence of Europeanized formal rules on the one hand and informal practices on the other, with the latter often subverting and substituting ad hoc informal arrangements for the rule of law.

This contrasts sharply with the gradualism in economic reforms and corporatism in the political structures which had earned Slovenia a distinctive status during the early transition period. In political science accounts of the transition, Slovenia was recognized as the only country in the region not following the neoliberal reform pattern advocated by the World Bank and International Monetary Fund (IMF).[42] However, this gradualism and consequent "soft" transition had a strong negative side effect. The chosen path of soft transition or gradualism "was strongly connected with the high reproduction of elites, which means that the majority of the old—partially already

[40] Jacques Rupnik, *How Things Went Wrong*, 23(3) J. Democracy 132, 134 (2012).

[41] Kim Lane Scheppele, *Goulash Post-Communism*, 52(3) NewsNet, News of the Ass'n for Slavic, E. Eur. & Eurasian Stud. 1, 3–4 (2012).

[42] *See* Dorothee Bohle & Béla Greskovits, *Neoliberalism, Embedded Neoliberalism and Neocorporativism: Towards Transnational Capitalism in Central-Eastern Europe*, 30(3) W. European Politics 443 (2007).

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'modernized and reformed'—communist elites managed to retain their positions in the new social circumstances."[43] This in turn led to "long-term malignant effects, including the establishment of monopolies and rent-seeking behavior."[44] This aspect, which had previously been masked, became apparent to the public after the eruption of the economic crisis in Slovenia in 2010.

Until recently, Slovenia had traditionally received very high scores on the Freedom House index of democracy and rule of law. In the press, it had been portrayed as a "success story" among the transition countries. According to the latest World Bank data, Slovenia, a high-income country (HIC) by World Bank standards, is economically the most developed country in the region.

Taking into account the facts presented above, the reversal of this trend is, quite unsurprisingly, difficult to understand. Although the crisis primarily emerged as an economic one, i.e., a crisis of the banking sector, it also exacerbated the political crisis. Once one considers the Potemkin nature of institution building in combination with the negative effects of gradualism as exposed by the banking crisis, the backsliding taking place in Slovenia begins to make sense.

Three factors merit emphasis. First, the institutional reforms in Slovenia were too much about "copying and pasting" formal rules instead of creating adequate institutions with the right incentive structures. The role of the EU during the accession period substantially contributed to this pattern of "shallow institutionalization." The evaluation of formal compliance with the Copenhagen criteria was based on the adoption of laws rather than on implementation and compliance.[45] It comes as no surprise that the Slovenian judiciary, civil service, and many other "independent" agencies look very similar to their European counterparts. However, behind this deceitful similarity there lies a completely different reality, one which until recently had gone largely unnoticed by foreign observers.

For example, the judiciary enjoys full statutory independence and life tenure. However, looking at its performance, one finds a frustrating picture of excessive length of judicial proceedings (which generally exceeds three years) and ineffectiveness in prosecuting corruption and clientelism. As a result, the Slovenian judiciary, with the exception of the Constitutional Court, is among the least trusted institutions in Slovenia, with only the executive, the political parties and Parliament garnering less respect from the public.[46]

The Slovenian civil service offers another telling example of the discrepancy between the form and the substance of legal institutions. With the adoption of the Civil Servants Act in 2002, Slovenia received the approval of the European Commission. The Civil Servants Act formally introduced a career-based system of public service,

[43] Frane Adam, Primož Kristan, & Matevž Tomšič, *Varieties of Capitalism in Eastern Europe (with special emphasis on Estonia and Slovenia)*, 42(1) Communist & Post-Communist Stud. 65, 78 (2009).

[44] *Id.* at 71.

[45] Petra Guasti, Bojan Dobovšek, & Branko Ažman, *Deficiencies in the Rule of Law in Slovenia in the Context of Central and Eastern Europe*, 14(2) Varstvoslovje. J. Crim. Justice & Security 175, 187 (2013).

[46] Politbarometer, CJM, 1/2013, Jan. 2013, *available at*: https://www.ip-rs.si/fileadmin/user_upload/Pdf/razno/politbarometer_1-2013.pdf.

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with open competition for positions in the civil service and a politically neutral system of recruitment headed by a new body, the Civil Service Council. But the reality was quite different. Instead of a modern career-based and politically neutral civil service, Slovenia ended up with one of the most politicized civil service systems in the region. According to the first comparative study on the politicization of senior civil services in Central and Eastern Europe, Slovenia belongs to the group of countries with the highest score in the category of politicization. [47]

Second, many "rule of law" institutions (courts, the civil service, and the media) have been deeply politicized by the former "nomenclature officials." Instead of defending the rule of law, these institutions, unable to withstand the strong political pressure of their "principals," were engaged in legal enforcement favoring partisan political interests. Since the left-liberal political bloc (former communists (Social Democrats, SD) and the reformed Communist Youth Organization (Liberal Democracy of Slovenia, LDS)) had dominated the political space for almost fourteen years, this strongly impacted the formation of the Slovenian elite in general. Consequently, the majority of Slovenian elites gravitated towards the "retention" elite, represented by the LDS and SD political parties.[48] This elite managed to create better contacts with the business sector, media, academia and, most importantly, with a substantial part of the public sector, including the judiciary, civil service, state-owned companies, etc.

Third, formal democratic rules and institutions often operate in the shadow of informal networks and practices. As explained above, the entire public sector is governed by informal practices and networks which exist in parallel to formal rules. Numerous interest groups, political parties, and individuals use these networks and practices to extract state resources. One of the most troubling aspects revealed by the banking crisis is the ease with which the politically installed managers of public enterprises, banks, insurance companies, public universities, and the national broadcasting service distribute money and other non-pecuniary advantages (jobs, perks) to their political friends, relatives, etc. Moreover, the political distribution of jobs and money in the public sector skillfully abuses the weaknesses of the formal system described above. With weak, underdeveloped, and politically controlled rule-of-law institutions, it was not that difficult to subvert and abuse formally prescribed rules and procedures. Quite often, this extraction of public resources was carried out according to the letter of the law, but in sharp contrast to its spirit. In other words, public procurement, state aid, loans, and employment practices usually adhere to formal rules, but the factual meaning of these rules is informally reinterpreted in the shadow of informal practices. As a result, cronyism and "state capture" have become so widespread and "internalized" that informal rules and habits are more important than formal rules.

Shallow institutionalization, pervasive politicization, and informal subversion of rule-of-law institutions have shed a completely new light on the Slovenian "success story." The reality behind Slovenia's "smooth transition"[49] reveals many "structural

[47] Jan-Hinrik Meyer-Sahling & Tim Veen, *Governing the Post-Comunist State: Government Alteration and Senior Civil Service Politicization in Central and Eastern Europe*, 8(1) E. Eur. Pol. 4, 10–11 (2012).

[48] Adam et al., *supra* note 43, at 68.

[49] Anton Bebler, *Slovenia's Smooth Transition*, 13(1) J. Democracy 127 (2002).

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weaknesses of Slovenian model of socio-economic regulation that led to development of its version of 'crony-capitalism' characterized by entanglement of the political and business elite."[50] As shown above, Slovenia is caught in a downward spiral of the disintegration of key rule-of-law institutions. The thorough politicization and informal subversion of these institutions leaves constitutional democracy in Slovenia incomplete and vulnerable at a time of democratic recession and financial crisis in the Eurozone. At the very moment the rule of law is most needed as a legal "immune system" to protect constitutional democracy, it is either unavailable or under strain.

The story of democratic "regression" in Slovenia would be incomplete without noting some rare exceptions to the trend. Namely, contrary to the low prestige of regular courts, the Constitutional Court has evolved into a powerful and respected judicial body. Despite the Court's occasional judicial activism, its decisions have very rarely been challenged or questioned. It enjoys the prestige of being the most respected juridical institution in the country. Furthermore, the case law of the Constitutional Court has been crucial in improving the protection of human rights in the country.

2.4. Differences and similarities: two forms of backsliding

The first big difference between the two "paths" to democratic backsliding is that Hungary's "constitutional revolution" was achieved directly by changing the country's constitution, whereas the Slovenian case did not involve any changes of formal constitutional rules. It was precisely the fact that Orbán was able to change the constitution to his own advantage that made it possible for him to acquire the almost unprecedented concentration of power in the hands of his government.

In Hungary, the new Constitution vests so much power in the centralized executive that no real checks and balances exist to restrain this power. In the Slovenian case, on the other hand, formal constitutional rules remain intact and do not even remotely show signs of authoritarian elements. As described above, state capture in Slovenia was achieved by informal parallel structures and practices coexisting alongside formal democratic rules. This parallel network of power and control, though ubiquitous, is much more dispersed in comparison with the Hungarian "model." While the old "retention" elites exert the most power, they still have to share it with other political elites in the country: though only in power for a short time, the center-right political elite continued the old pattern of governing the economy and filled positions in the public sector with party candidates and friends.

Another factor which also helps explain the Slovenian pattern is the electoral system. In Slovenia, a proportional system combined with a low electoral threshold leads to multiparty coalitions usually composed of more than three parties. The mixed proportional (PR)/majoritarian system in Hungary, on the other hand, translated Fidesz's electoral victory in 2010 into one-party rule. The Slovenian elites were "forced" to

[50] Matevž Tomišič & Lea Prijon, *Ideological Profile and Crisis Discourse of Slovenian Elites*, Paper prepared for the 8th Pan-European Conference on International Relations, Warsaw, Poland (Sept. 2013), *available at* http://www.eisa-net.org/be-bruga/eisa/files/events/warsaw2013/Tomsic%20Prijon_Ideological%20Profile%20and%20Crisis%20Discourse%20of%20Slovenian%20Elites.pdf.

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share their power with other members of the coalition, which largely prevented an absolute concentration of power in the hands of only one party.[51]

Democratic backsliding in Slovenia can be hardly described as just another version of authoritarian constitutionalism. There are regular and free elections which usually lead to a change of power, all of which are minimum prerequisites of "electoral democracy." Moreover, there are a few institutions (the Constitutional Court, the Human Rights Ombudsman) that still try to ensure a minimum protection of constitutional rights. Nevertheless, other essential rule-of-law institutions are politicized and weak. As a consequence, the political elites use the parallel network of informal rules and practices to achieve near "control" of the democracy in Slovenia. With their extensive network of informal political power, these elites first captured the state and are now distributing the spoils to their cronies. The Slovenian case can therefore be said to resemble other cases of state capture to be found in the region.[52]

I would therefore argue that the Slovenian case represents a very subtle form of democratic regression, where competitive political elites control democracy in a non-transparent manner. Since the rule of law and political competition still are in place, albeit in a quite rudimentary form, Slovenia would be better described as a "diminished form of democracy" rather than a "diminished version of authoritarianism."

The Hungarian pattern of democratic backsliding appears much more "transparent" than the messy, opaque, and informal Slovenian model. In Hungary, it is more than abundantly clear who is running the government. One could therefore be tempted to think that, because of this supposed transparency, the Hungarian brand of authoritarianism presents less of a puzzle than Slovenia. All that is needed are new elections and the victory of the opposition, and the Fidesz government will be replaced. The situation, however, is much more complex, and it is here that differences between the two models end and similarities begin.

Although firmly entrenched in the Constitution, Orbán's authoritarian rule needs to be translated into practice to become effective. Yet between the formal entrenchment and practical implementation of the new rules, there lie a number of mediating factors that could either prevent or help the transformation of the nature of the Hungarian constitutional system. As in Slovenia, in order to change the Hungarian authoritarian regime, it is not enough to change the formal rules. Consolidation of constitutional democracy in both countries requires much more, although changing the rules is a prerequisite for change in the Hungarian case.

The first similarity that should be pointed out is that political opposition and civil society remain weak and disorganized in both countries. It is not entirely clear that either the opposition or civil society groups actually want to change the nature of the political system in either country. This is especially true of the opposition parties which, while in power, resorted to practices very similar to those now being used by the government.

[51] Fidesz, although in a coalition with Christian Democratic People's Party (KDNP), has enough seats (226 out of 386) for majority rule.

[52] Innes, *supra* note 29, at 1–15,

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The role of both the Slovenian and Hungarian Constitutional Courts in controlling the excesses of the executive will be of utmost importance for the quality of constitutional democracy. Despite the fact that both courts emerged as some of the strongest courts in the region, their importance is currently being undermined.

The role of regular courts and other rule-of-law institutions will also crucially affect the implementation of rules in both countries. The regular courts, which have been a major disappointment in Slovenia, are showing some important signs of consolidation and independence in Hungary. How the new authoritarian regime is going to affect their jurisprudence is yet to be seen. Needless to say, the effectiveness of anti-corruption campaigns needs to be significantly strengthened in both countries.

While rule-of-law institutions can represent a decisive check on the arbitrariness of the executive power, they alone cannot prevent authoritarianism. Only democracy has this power. In other words, if citizens continue to vote for autocrats, rule-of-law institutions alone are not enough to stop the rise of dictators.

Notwithstanding the fact that these two forms of democratic regression in Central Europe reveal many differences, I would argue that the similarities are even more important: the differences as such do not predetermine which of the two models will be more or less resistant to further transformation of both regimes.

Section 3 will examine these similarities and try to explain their role in bringing about the crises of constitutional democracy in Central Europe.

3. The origin and the causes of the crisis

The constitutional crisis in Central and Eastern Europe largely coincides with a worldwide trend of democratic recession and fatigue[53] and with the biggest crisis the EU has faced since its inception. One of the key questions is whether backsliding and democratic regression in Central and Eastern Europe partakes of the more general trend or represents a specific crisis. Using the cases of Hungary and Slovenia, I argue that the current constitutional crisis in both countries and in the region as a whole represents a specific crisis the origins of which derive from certain "deep-structure" features of the transition in Central and Eastern Europe. The constitutional crisis is, of course, related to the implications of the global and EU economic and financial crisis, but its real roots lie elsewhere. My claim is that while the EU economic crisis accelerated and deepened the constitutional crisis, it was not its primary cause. In order to understand the current crisis, we need to return to 1989 and look at how institutional actors in the region approached the transition from socialism to democracy.

My core argument is that the simplistic/linear theory of transitional constitutionalism made a profound impression on the actual transition process in Central and Eastern Europe. The basic idea was that the transition is "an intermediary stage" between points A and B, "where A is the old, sham, communist constitutionalism . . .," and B "is identified with Western, liberal-democratic, 'actually existing' constitutionalism."[54]

[53] *See* Diamond, *supra* note 27, at 19–23.

[54] Wojciech Sadurski, *Transitional Constitutionalism: Symplistic and Fancy Theories*, *in* Rethinking the Rule of Law after Communism 9, 9 (Adam Czarnota, Martin Krygier, & Wojciech Sadurski eds., 2005).

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Although alternative, "fancy" or "exceptional" theories were present, they were overshadowed by this simplistic approach. These theories claimed that "post-communist constitutionalism is 'transitional', but not in the sense of being an interim space between the two reasonably identifiable points of departure and arrival. Rather, this type has some characteristics of its own which do not collapse into the exigencies of passage from A to B."[55] It should also be noted that the simplistic theories of transition were also deeply ingrained in the doctrine of the so-called Washington consensus, which strongly shaped the process of institution building during the transition period.

I would argue that there are deep structural reasons behind the crisis in Central and Eastern Europe, the absence of a tradition of rule of law in this part of the world prior to 1989 being one of the key reasons for the current malaise. Other key reasons include the shallow institutionalization of the rule-of-law institutions, the adverse effects of legal constitutionalism on the quality of democracy and rule of law in CEE countries and the ahistorical approach of the one-size-fits-all ideology of transitional constitutionalism.

3.1. "Forms without substance": shallow institutionalization of the rule of law

The simplistic theory of transition contributed to a *"shallow institutionalization" of rule-of-law norms and practices in CEE countries.* While policy strongly emphasized "getting institutions right" and required the formal compliance of the newly introduced institutions with idealized Western models, much less attention was paid to the actual implementation and enforcement of the new rules. As a result, many rule-of-law institutions mostly took the form of "façade" institutions, devoid of importance or real substance. As already mentioned, they resemble "forms without substance" from the late-nineteenth-century modernization experiences, when CEE countries unsuccessfully attempted to emulate Western European democratic institutions.[56]

A major part of the rule-of-law structures in contemporary Central and Eastern Europe was built during the age of the Washington consensus. The term Washington consensus usually refers to a set of policies advocating economic liberalization, privatization and fiscal austerity initially designed in the 1980s and 1990s by the IMF, the World Bank, and the US Treasury to respond to the economic crisis in Latin America.[57] Later, a similar set of policies was applied to the former Communist countries in Central and Eastern Europe. The Washington consensus is now known to have had a strong anti-statist bias. More attention was paid to courts, judges, property law, and contracts than to the administrative agencies, civil servants, and regulatory policies needed to implement various developmental policies of the state. The neoliberal ideology underpinning the Washington consensus was anti-statist in the sense that it did not provide much room for the state as a regulator of economic activity. The only role left for the state was to protect property rights, enforce contracts and protect against the arbitrary use of governmental power.

[55] *Id.* at 9.

[56] Berend, *supra* note 223, at 300–301.

[57] The term was coined by John Williamson in 1989. *See* John Williamson, *What Washington Means by Policy Reform*, *in* Latin American Readjustment: How Much Has Happened 7 (John Williamson ed., 1989).

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It is therefore hardly a surprise that during the initial stage of the transition, the process of building public law institutions was less important than the process of economic reform.

It was only during the period of EU enlargement that reforms of public law institutions came to the top of the agendas of both the CEE governments and the Commission. But given the prevalent mentality of the time, even EU-initiated reforms of public law institutions could not escape the dogmatic formalism of neo-liberal development experts. In other words, civil service reforms, anti-corruption campaigns, transparency initiatives, and, more recently, the creation of new developmental agencies mainly involved creating more and more new rules; if the new rules did not function, they were replaced with yet another set of rules.

While the initial effects of Europeanization in Central and Eastern Europe were immediately felt, they led to more "shallow" institutionalization of European principles and ideas.[58] Reformers in CEE countries were under strong pressure to adopt adequate institutions post-haste in order to satisfy various conditionality requirements. Unlike in the old member states, the process of institution building was a short one with very limited sets of institutional and policy choices.[59]

The desire of reformers to create institutions that "look" European had an important legitimizing effect during the accession negotiations. The rhetoric of "a return to Europe" was an important political and ideological device used by the CEE elites during the enlargement process. The question of whether the return to Europe helped to create the robust and well-working institutions sorely needed by the nascent democracies in Central and Eastern Europe or led to "Potemkin" harmonization resulting in formal structures designed to please the EU, but having little impact on actual domestic outcomes, has become a fundamental part of transition literature.

Many examples from Section 2 of this paper clearly illustrate the shallowness of the institutionalization of rule-of-law institutions in Hungary in Slovenia. Both countries adopted Western-style civil service laws, statutes declaring the independence of the judiciary and modern anticorruption strategies, but these new formal rules neither created professional, politically independent judiciaries or civil services nor provided effective tools for fighting corruption.

As a consequence, rule-of-law institutions like the judiciary, the civil service, anti-corruption commissions, the media, etc., which are essential for constitutional democracy, have very superficial roots in these post-communist societies.[60] Vladimir Tismaneanu's nearly prophetic argument that "political reform in all these post-communist societies has not gone far enough in strengthening counter-majoritarian institutions (including media and the market economy) that would diminish the threat of new authoritarian experiments catering to powerful egalitarian-populist sentiments"

[58] On this point, *see* Martin Krygier & Adam Czarnota, *After Postcommunism: The Next Phase*, 2 Ann. Rev. L. & Soc. Sci. 299 (2006).

[59] David R. Cameron, *The Challenges of Accession*, 17(1) E. Eur. Pol. & Soc'ies 24, 29 (2003).

[60] For a very illustrative account of shallow internalization of legal norms and institutions in the post-communist world, *see* Denis James Galligan, *Legal Failure: Law and Social Norms in Post Communist Europe*, *in* Law and Informal Practice: The Post-Communist Experience 1 (Denis James Galligan & Marina Kurkchiyan eds., 2003).

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therefore is not surprising.[61] As I argue below, a key focus of the institutional reforms of the next few years must be on strengthening rule-of-law institutions. In Section 4, I will address the interesting and important question of whether a stronger judiciary, a more independent civil service and more efficient anti-corruption agencies will be able to change the authoritarian nature of the new Hungarian constitutional order or help to prevent a further slide towards state capture in Slovenia.

3.2. Legal versus political constitutionalism

Another flaw of the simplistic theory of transition lies in its over-simplification of how constitutionalism *actually* works in Western democracies. Under the strong influence of the Washington consensus, a court-centered, rights-based, and depoliticized account of constitutional democracy prevailed during the early stages of the transition.[62] Accordingly, constitutional courts and other non-political bodies, such as independent agencies, central banks, etc., emerged as the key agents of the constitutional transformation in Central and Eastern Europe. However, as Sheri Berman has argued, the history of democracy in the West shows a different pattern: "The idea that a gradual, liberal path to democracy exists and that it makes sense to discourage countries that do not follow it from democratizing is a chimera based on a misreading or misinterpretation of history. . . . Indeed, the political backstory of most democracies is one of struggle, conflict and even violence."[63]

In other words, the history of democracy in the West clearly reveals the importance of continuous civic and political struggle for successful democratization. This aspect of democracy building was almost "lost in translation" in the CEE context, where the process of democracy building was often portrayed and perceived as an elitist project based on the assumption that political elites knew exactly how to get from the point A (failed Communism) to point B (idealized Western democracy). As Mungiu-Pippidi notes:

> In Western Europe and North America, the historical process of building accountable government and creating a politically neutral and professional service was generally lengthy and time-consuming. Depending on the historical context, various actors, from Swedish aristocrats to British financiers and American intellectuals, put forward assertive demands for professional and accountable government. These demands led to changes in both formal and informal institutions.[64]

She further argues that the development of good governance institutions was a struggle fought and won primarily by the political opposition, civil society or even enlightened despots. The role of the political dimension of the process of generating democracy and rule of law has been profoundly underplayed by the "new constitutionalism" in Central and Eastern Europe.

[61] Vladimir Tismaneanu, *Leninist Legacies, Pluralist Dilemmas*, 18(4) J. Democracy 34, 37 (2007).

[62] Paul Blokker, *Constitutionalism and Constitutional Anomie in the New Europe*, Università degli studi di Trento, Facolta di Sociologia, Quaderno 53 (Nov. 2010).

[63] Sheri Berman, *How Democracies Emerge: Lessons from Europe*, 18(1) J. Democracy 28, 38 (2007).

[64] Alina Mungiu-Pippidi, *Corruption: Diagnosis and Treatment*, 17(3) J. Democracy 86, 90–91 (2006).

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According to Paul Blokker, the "new constitutionalism" represents a species of a more general genus, "legal constitutionalism," and can be juxtaposed to another type of constitutionalism: "political" or "democratic constitutionalism."[65] Applied to the CEE context, legal constitutionalism led to "a one-sided emphasis on formal institutions of the rule of law and the entrenchment of democracy . . ." which, in turn, contributed to ". . . a neglect of substantive, participatory and legitimatory dimensions."[66]

The almost exclusive focus of the new constitutionalism on courts and rights-based democracy is part of a larger worldwide trend towards the judicialization of politics.[67] Needless to say, the role of courts in democratic society is always problematic. Aggressive judicial activism inevitably raises issues of counter-majoritarian difficulty and the democratic accountability of independent institutions like courts. My concern here, however, is not with the anti-majoritarian dilemma and its obsession with the *gouvernement des juges*. I argue that the very different political context in Central and Eastern Europe requires a different approach to the role of courts in society. The region has a weak, or sometimes non-existent, tradition of protection of human rights, particularly the rights of minorities. Almost the entire region has a strong history of ethnic nationalism aimed at the suppression, rather than accommodation, of ethnic minorities, such as Roma, homosexuals, or Jews. Central and Eastern Europe needs liberal democracy to tame these horrible and violent excesses. Majoritarian rule, therefore, needs the limitations that are imposed in liberal democracy by independent political institutions and constitutionally codified rights and freedoms. I thus share the view of those who see strong constitutional courts as one of the key democratic players in this region.

The problem, therefore, is not that the courts are too strong, but rather that the new constitutionalism has a subversive effect on a more inclusive, republican version of constitutionalism and, paradoxically, a negative effect on the quality of rule-of-law institutions. As numerous examples show, rule-of-law institutions in Central and Eastern Europe were all too often created from above, without the support of various political groups and civil society associations.[68] Yet it is precisely this political element, in the form of political demands and pressure for such institutions, that ultimately determines the success or failure of any attempts at good governance building. As Venelin Ganev succinctly points out, "the Rule of Law cannot live by judicial review alone."[69] Referring specifically to Central and Eastern Europe, Paul Blokker argues

[65] For one interpretation of popular constitutionalism, *see* Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 Chi.-Kent L. Rev. 991 (2006). For a critical account of political constitutionalism, *see* Marco Goldoni, *Two Internal Critiques of Political Constitutionalism*, 10(4) Int'l J. Const. L. 926 (2012).

[66] Blokker, *supra* note 18, at 1.

[67] Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 Fordham L. Rev. 721 (2006).

[68] For a very instructive account, *see* Grażyna Skapska, *The Rule of Law, Economic Transformation and Corruption After the Fall of the Berlin Wall*, 1(2) Hague J. Rule of Law 284 (2009). *See also* Attila Ágh, *Report on Democracy, Liberty and Freedom in Central and Eastern Europe*, Foundation for European Progressive Studies Paper (Oct. 2012), *available at* http://www.feps-europe.eu/assets/7c2f832a-a70b-4340-9e17-818e2e0cb0ab/report%20attila%20agh.pdf.

[69] Venelin I. Ganev, *The Rule of Law as an Institutional Wager: Constitutions, Courts and Transformative Social Dynamics in Eastern Europe*, 1(2) Hague J. Rule of Law 263, 270 (2009).

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that "participatory dimensions, popular democracy, and civil society promotion, even if certainly not wholly absent from constitutions in the region, seem then to ultimately have an only secondary priority in constitutional hierarchies."[70]

That such a depoliticized approach to rule-of-law building can lead only to formal routines with surprisingly limited effect on society is made abundantly clear by the example of anti-corruption campaigns in Central and Eastern Europe. An excessive focus on rules and legislation disassociated from policy goals and social context has largely contributed to the creation of "formal structures without substance" in the field of combating corruption, structures which look similar to their Western counterparts, but fail to produce the expected results. Slovenia and Hungary invested too many resources in the formal transplantation of various transparency and anticorruption codes without paying sufficient attention to incentive structures likely to render such codes workable.

In Slovenia, as in many other CEE countries, one can discern a cognitive dissonance between politicians' symbolic support for anti-corruption strategies and their political support for a real fight against corruption. As Mungiu-Pippidi argues, one of the major reasons why so many anti-corruption initiatives fail is that they are non-political in nature, unlike the corruption they are designed to fight, which is largely political. Instead of creating institutions and legislation that would mimic Western models, these countries should focus on the "institutional triggers" which led to the creation of institutions of this kind in "clean countries."[71] Best practices should include not only legislation, but also anti-corruption initiatives which lead to the creation of anti-corruption legislation.

Mungiu-Pippidi also argues that a formalistic approach to anti-corruption campaigns faces severe limitations. It is not surprising that, due to a lack of political support, the largely symbolic work of anti-corruption agencies is not followed by actual work on anti-corruption. She urges these countries to find a mechanism that would solicit the support of the political opposition and civil society for anti-corruption initiatives. At the same time, such campaigns cannot be successful without the cooperation of the government. The current design in Slovenia, as in many other CEE countries, creates a gap between the government and the anticorruption agency. Recently, pressure from civil society has effectively begun to make a mark on anti-corruption efforts, but more concrete results still seem a ways off.

The Hungarian anti-corruption campaign suffers from similar problems. As Agnes Batori notes, anti-corruption laws fail in Hungary "at least in part because they can be expected to elicit only limited support from the citizens whose behavior they seek to change."[72] Hungary therefore presents a clear example of "the paradox . . . [that] although its legislative framework against corruption is rather well-developed, neither perception-based indicators such as CPI nor survey data on citizens's experiences with various forms of bribery in daily life show any significant improvement in the last

[70] Blokker, supra note 62, at 20.

[71] Mungiu-Pippidi, *supra* note 64, at 86.

[72] Agnes Batory, *Why do anti-corruption laws fail in Central Eastern Europe? A target compliance perspective*, 6 (1) Regulation & Governance 66, 79 (2012).

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decade."[73] The best recipe for compliance in anti-corruption campaigns is the normative commitment of citizens to the declared goals of such campaigns. At the moment, 70 percent of respondents in Hungary said that "bribery and corruption are commonplace."[74] The government responded with a series of new anti-corruption measures. Without stronger support and participation from Hungarian citizens, such measures are not likely to change the current state of affairs in Hungary.

Legal constitutionalism, as practiced in Central and Eastern Europe, thus has a built-in paradox: while it tried to build the rule-of-law institutions needed to curb the excesses of the majoritarian will, it simultaneously weakened these institutions by neglecting to elicit broader political support for their actions. Today it is commonly acknowledged that the whole process of accession systematically favored executives over parliaments and civil society.[75] As I argue in Section 4, this paradox further highlights the limits of legal constitutionalism and the need to complement—not replace—it with political/democratic constitutionalism.

3.3. History as context: a historical turn in transitional constitutionalism

A third problem inherent in "simplistic" theories of transition is their almost complete neglect of history. And it is a rather fascinating problem. Not only were the representations of Western models in these theories inaccurate; they also expose an almost reckless ignorance of the importance of history in understanding the transition. Of the many theoretical objections to these theories, perhaps the most fundamental is that they confuse description with prescription. There was little theoretical argument or empirical evidence to back up the notion that the particular features of simplistic theories of transition were necessary, let alone sufficient, for development, or to support the ahistorical universalist assumption that all countries could or should follow the same road to riches as Western Europe and the US.

One of the most fascinating aspects of these theories is that they have totally disregarded the importance of one crucial historical difference between Western models and CEE reality: the rule of law in Western Europe pre-dated the development of democracy by many centuries. As Fukuyama notes, Western Europe was quite exceptional in this respect: "the rule of law became embedded in European society even before the advent not just of democracy and accountable government, but of the modern state-building process itself."[76] The best example is probably the *Rechtsstaat* in nineteenth-century Prussia, which established constitutional checks on the executive authority well before democracy emerged in Prussia.

[73] *Id.* at 78.

[74] Veronika Gulyas, *Hungary Urged to Fight Gathering "Perfect Storm" of Corruption*, The Wall Street Journal: Emerging Europe Blog (May 30, 2013), *available at* http://blogs.wsj.com/emergingeurope/2013/05/30/hungary-urged-to-fight-gathering-perfect-storm-of-corruption/

[75] *See* Heather Grabbe, *How does Europeanization Affect CEE governance? Conditionality, Diffusion and Diversity*, 8(6) J. Eur. Pub. Pol'y 1013 (2001).

[76] Francis Fukuyama, *Transitions to the Rule of Law*, 21(1) J. Democracy 33, 36 (2010). This is also Zakaria's argument. *See* Zakaria, supra note 17, at 27.

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Such a tradition was almost completely absent in the CEE countries, with the exception of Poland and the Austro-Hungarian provinces, which enjoyed limited but nonetheless important exposure to the rule of law as it existed in the Polish-Lithuanian Commonwealth and the Habsburg Monarchy.[77] However, as Ivan Berend argues, these countries never fully modernized their legal and political institutions and remained on the periphery of the advanced Western world: "Both the states and the governments were traditionally autocratic and remained authoritarian, with an autocratic interpretation and practice of law and civil rights."[78] Furthermore, in the 1930s, most of these countries turned into "anti-liberal" dictatorships.[79] After World War II, Communist rule in these countries almost completely destroyed the last remains of the rule of law tradition and substituted it with the "socialist" concept of legality, which was antithetical to the core elements of the rule of law. Not surprisingly, today only very old people in these countries still remember the pre-Communist rule-of-law tradition. CEE countries therefore had to create, basically from scratch, new legal rules and institutions.

Thus when the transition started, there were very few vestiges of a rule of law tradition in the CEE countries; several key conditions for a robust, "polyarchic" democracy, such as free media, the rule of law and a vibrant civil society, did not exist in most CEE countries prior to 1989. It is therefore quite astonishing that the rule of law ideology of the time (the Washington Consensus) often paid no attention to such structural differences between Western democracies and CEE countries and opted for a largely ahistorical approach to building constitutional democracy. This aspect of transitional constitutionalism is brilliantly problematized by Grażyna Skapska in her contrast between "institutional optimism" on the one hand, which was largely based on an ahistorical understanding of the rule of law, and "sociological realism" on the other, which exposed many fundamental weaknesses of the post-Communist governments and their lack of resources for the efficient implementation of law and protection of the rule of law.[80] Using the case of the privatization of state-owned property in the CEE countries, Skapska shows how a neglect of such contextual features led, rather than to a wide distribution of property rights and a smooth transition to capitalism, to corruption, nepotism, and clientelism as key mechanisms of privatization.[81] The Russian example of "*prikhvatizatsiya*"[82] which led to the creation of a group of oligarchs who controlled vast sectors of Russian economy, is only the most extreme manifestation of this problem.

At the same time, the argument about the importance of historical differences should not be understood as yet another argument for "sequentialism," that is, that CEE countries need a strong state and the rule of law first, and democracy second.

[77] Ian D. Armour, A History of Eastern Europe 1740–1918: Empires, Nations and Modernisation (2012).

[78] I. T. Berend, History Derailed: Central and Eastern Europe in the Long Nineteenth Century 235 (2003).

[79] Berend, *supra* note 23, at 301.

[80] Skapska, *supra* note 68, at 289.

[81] Skapska's insights have been recently confirmed by a sociological study. *See* Patrick Hamm, Lawrence P. King, & David Stuckler, *Mass Privatization, State Capacity, and Economic Growth in Post-Communist Countries*, 77(2) Am. Soc. Rev. 295 (2012).

[82] The verb "*hvatat'*" in Russian means "to grab" or "steal."

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As clearly stated in Section 1 above, the arguments presented in this article reject such a view and favor simultaneous processes of democratization and the development of the rule of law. In this context, the notion of a more historically oriented approach to institution building has a completely different meaning. The historical turn in transitional constitutionalism should not be understood as a search to identify a "deep past," as this could lead to historical determinism. Paradoxically, the more we search for the historical origins of legal institutions, the more we come to realize the path-dependent and context specific nature of these institutions:[83] the relationship between institutions and development changes over time. What might be good for one country in a certain period is not necessarily good for another country facing different circumstances. This insight was completely neglected during the transition process; if nothing else, it could have helped CEE elites avoid the mistakes of their early nineteenth-century predecessors, who, like them, attempted to emulate Western institutions and ended up with shell institutions that had little impact on their respective societies.

Fukuyama notes that this historical excursus into the origins of the rule of law has important implications for the promotion of rule of law:

> In purely technical terms, legal systems are among the most difficult and costly governmental systems to construct because they have huge infrastructure needs and require both human and physical capital. Historical experience with law suggest that more targeted programs may set important precedents that will eventually bear fruit as the society develops the capacity to spread them more broadly. There may be lower-cost alternatives based on customary or hybrid rules that will work better in the meantime.[84]

And it is no surprise that Fukuyama concludes his observation on transitions to the rule of law with a call for humility among rule-of-law promoters:

> We should admit to ourselves that we have very little historical experience in successfully constructing a rule of law in societies where this pattern is reversed and where a strong state precedes law.[85]

The first two decades of the transition clearly show that establishing "electoral democracy" is easier than creating constitutional democracy based on the rule of law. Organizing free and democratic elections, though a formidable task, is much less demanding than building an independent judiciary or civil service. It should therefore not be surprising that most CEE countries did well as far as "electoral democracy" is concerned: today, elections in the region are free and fair, and quite frequently lead to turnovers of power. Rule-of-law institutions are a different story. As I argue in this article, these institutions are often weak or underdeveloped, and thus fail to fulfill

[83] *See* Grzegorz Ekiert & Daniel Ziblatt, *Democracy in Central and Eastern Europe One Hundred Years Ago*, 27(1) E. Eur. Pol. & Soc'ies & Cultures 90, 103 (2013). Contrast Ekiert & Ziblatt's approach with the overly deterministic approach of Becker & Wosessmann, who argue that being a part of the Habsburg Empire created a long-lasting legacy of formal instutions in those parts of Central and Eastern Europe which were part of the Empire. *See* Sascha O. Becker & Ludger Woessmann, *The Habsburg Empire and the Long Half-life of Economic Institutions*, The CAGE Background Briefing Series No. 10 (July 2013).

[84] Fukuyama, *supra* note 76, at 41.

[85] *Id.* at 43.

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their essential function, i.e., to limit the abuse of uncontrolled state power. In order to improve rule-of-law institutions, we must not start from some idealized "best model," but from the existing context in which these institutions function. In the next section, I will discuss possible solutions to the current crisis.

4. Ways out of the crisis

4.1. From a one-size-fits-all approach to democratic experimentalism

In trying to get the law right, legal reformers in Central and Eastern Europe too often overlooked "that the life of the law, even in the well-appointed homes of the exporters of the rule of law, lies outside official institutions as much as, arguably more than, it does within them."[86] The promotion of the rule of law in Central and Eastern Europe should therefore adopt a new strategy: reforms in the region should now turn to previously marginalized "exceptionalist" versions of transitional constitutionalism. According to Sadurski, in response to the fact that the conditions for the first-best solutions are missing,[87] *exceptionalist constitutionalism* argues for the adoption of second-best institutions.[88] As mentioned above, such alternative institutional configurations do not represent a full-fledged alternative to liberal democracy. They merely show that (a) institutions of liberal democracy can assume many forms and (b) there are a number of different ways to construct these institutions.

One of the most flawed views of the Washington consensus was that a single set of most appropriate institutions—the rule of law being one of them—is required for successful development. Such a "one-size-fits-all" model prevailed in the transition thinking of the last two decades. As noted above, this model confused description with prescription. The real life of institutions such as parliamentary democracy, corporate governance, civil service, or judicial review shows that they can assume many different forms. Only when discussed in highly abstract terms do these institutions appear to be uniform, core institutional structures ("independent judiciary," "accountable government," etc.) which every democracy based on the rule of law must contain. With further qualification and specification, it becomes clear that these institutional structures can assume a number of forms.

The "one-size-fits-all" model of appropriate legal and political institutions therefore has to be replaced with a plurality of different models, each suitable for a particular country or group of countries. Instead of being told to transplant legal elements from rich industrial economies, the CEE countries should be encouraged to experiment with various forms of institutional configurations in order to find out which are most likely to advance and promote their own development.

[86] Martin Krygier, *The Rule of Law and the "The Three Integrations"*, vol. 1 (1) Hague J. Rule of Law 21, 24 (2009).

[87] Sadurski, *supra* note 54, at 12.

[88] The notion of the best and second-best institutions comes from economics. *See* Dani Rodrik, *Second-Best Institutions*, 98(2) Am. Econ. Rev.: Papers & Proceedings 100 (2008).

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Today's wealthy countries acquired most of the institutions that, according to the dominant view, are a prerequisite of economic development, after and not before they had developed economically. Such institutions were in many ways a result rather than the cause of their economic development. Mungiu-Pippidi arrives at nearly the same conclusion: "The explanation for the performance of historical achievers is not to be found in their present organization (legislation, political institutions), which should not be viewed as a cause, since it acts for the maintenance, rather than the creation, of good governance."[89] This is particularly important for the CEE countries, which *should avoid institutional fetishism* as promoted by the advocates of the Washington consensus. These countries should invest more in economic policies likely to promote economic development and approach institution building more pragmatically than they have in the previous two decades.

New institutions in Central and Eastern Europe could ultimately resemble their Western models. But it is more important that they actually work well for these countries, even if they look different from their Western counterparts.

4.2 Building political support for liberal democracy

One of the key problems of transitional constitutionalism in Central and Eastern Europe has been relatively weak support for rule-of-law institutions from citizens of the new democracies. Without appropriate "owners," new institutions are of little use. For example, the privatization experience in Central and Eastern Europe shows that clearly protected constitutional rights could not perform their function since there were few owners of this new property who could use these rights. A new approach to institution building must create institutions that are products of homegrown democratic engineering and as such more likely to avoid becoming empty façades. To take another example, anti-corruption strategies are doomed to fail unless they are based on a broad political consensus in all segments of society. One important lesson of the first two decades of the transition is that changes in constitutional rules and political institutions alone are insufficient and more democracy and broader political support for legal and political institutions are also needed. A crucial task currently facing CEE democracies is therefore the formulation of policies and strategies that could help sustain the more thorough democratization of these societies.

Citizens in Central and Eastern Europe have a low degree of trust in politics in general and in political parties in particular, and these countries need to invest more time and energy in reversing this trend. As the Slovenian and Hungarian cases reveal, establishing new, non-corrupt parties that can promote non-corrupt candidates seems to be a promising strategy. At present, voters in these two countries can choose among more-or-less corrupt party candidates. Only new democratic parties would offer a realistic chance of political change in the direction of greater democracy. In modern liberal democracies, it is the political parties that connect governance to the

[89] Alina Mungiu-Pippidi, *Becoming Denmark: Understanding Good Governance Historical Achievers*, *in* The Development of Good Governance, *available at* http://www.againstcorruption.eu/uploads/norad/Becoming-Denmark-Historical-Lessons-Learned.pdf.

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people. It is therefore essential to reestablish political trust in political parties and politicians. Needless to say, these new parties could hope to elicit broader support only by offering new candidates, untainted by and independent of existing ruling elites.[90] The democratization of political life is probably the single most important objective to be achieved if CEE countries wish to consolidate their democracies. This democratization of political life would provide a departure from the existing practice of elite-driven democracy building processes. Such a change would also create many new possibilities for democratic constitution making, which was largely sidelined in the past two decades of the transition. New citizens' initiatives, programs, and policies would become institutionalized, thus opening up new channels for democratic policy making in these societies.

But it is not only political parties that require democratization and new personnel. Modern liberal democracies are heavily dependent upon capable and professional public sectors for both the creation and implementation of public policies. The anti-statist bias of the early stages of the transition almost totally neglected the importance of efficient public sectors for the sound functioning of democracy. As numerous examples from Slovenia and Hungary show, the credibility and quality of judges, civil servants and other employees of various state agencies is crucial for the proper design of liberal democracy. Estonia presents an interesting case. It practically replaced all judges who had served under Communism. As Mungiu-Pippidi reports, by 1994, the judicial body had undergone a 67-percent renewal.[91] The judiciary was evaluated and purged. The fast and deep democratization produced by these purges was essential for the subsequent successful development of an independent judiciary in Estonia. However, a word of caution is in order: what was possible in the immediate aftermath of 1989 might not be possible today. More than twenty years after the fall of Communism, such radical purges might not enjoy a broad political support. Alternative strategies should therefore be used, including pre-tenure trial periods for judges. Slovenia, for example, made a big mistake when it almost unconditionally granted tenure to all judges serving in 1991. In retrospect, unconditional tenure weakened, not strengthened, the independence of the judiciary in Slovenia. Since many CEE countries are small economies, they might not have an unlimited reservoir of new cadres at their disposal. The example of the Baltic public sector reform shows that investing in the adequate education and training of civil servants turned out be a very good policy. As a result, these countries now have the most independent civil service personnel in the region.

That the choice of the people who hold power may matter more than the rules governing the work of institutions is made abundantly clear by several examples from Central and Eastern Europe. This is not to say that rules are unimportant; but it is only

[90] I would like to thank Kim Lane Scheppele for bringing up this point. As she explains, the (Communist) Party was so discredited after 1989 that no one thought that parties were worth building. So the money and the attention, as well as the focus on the rules of the EU accession process, went into governing institutions rather than into parties. Personal e-mail correspondence with Kim L. Scheppele (Nov. 10, 2013).

[91] Alina Mungiu-Pippidi, *A House of Cards? Building the Rule of Law in East Central Europe* (2010), *available at* http://ssrn.com/abstract=1686644.

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to emphasize that in the current context they often have only a secondary importance. CEE countries should therefore invest more time in educating and selecting the right candidates for various governmental posts instead of constantly changing the legislation governing their work. The best way to guarantee independent judges, professional civil servants, and vigorous ombudsmen is by providing the potential holders of these posts with the best possible liberal education and training, and by adopting strict selection criteria that give jobs only to the best candidates. In other words, there is an enormous demand for meritocracy, especially after two decades of a policy of party favoritism that saw jobs go to the members or friends of the political parties in power. Modernized and credible public sectors would thus represent a key precondition for the effective implementation of the new ideas and policies of newly created political parties.

And last but not least, it is citizens who are essential to boosting the process of democratization, as representatives of civil society who support, and are involved in, various political initiatives, groups, and activities, the scope of which extends beyond political parties and parliamentary elections to encompass a number of other bottom-up associations and groups. As political parties and other public institutions gain greater trust and popularity, it is to be expected that citizens, in various forms of civil society, will reclaim the public political space, thereby providing a new impetus to the democratization process. Ultimately, support for democracy depends on citizens. It is only citizens who can create and sustain democracy in life.

5. Conclusion

Just ten years after their triumphant "return to Europe" in 2004, CEE countries are facing a very serious crisis of constitutional democracy. The crisis of constitutional democracy in Central and Eastern Europe, which coincides with the Eurozone crisis, has a specific origin. As I have tried to show in this article, rule-of-law institutions in these countries are less robust than in Western countries. In other words, Western democracies can cope more successfully with various attacks on their liberal institutions because their courts, media, human rights organizations, and ombudsmen have a longer and better-developed tradition of independence and professionalism. Conversely, where such institutions are weak and underdeveloped, as is the case in Central and Eastern Europe, there is always the potential danger of a drift towards authoritarianism and "illiberal democracy." As the examples of Hungary and Slovenia show, even the most advanced CEE democracies are not immune to backsliding. In a relatively short period of time, both countries regressed from consolidated democracies into two distinct forms of semi-authoritarian and diminished democratic regimes. Particular worrying is the ease with which this regression occurred.

Many liberal institutions created during the enlargement process need further reforms. During enlargement of the EU, the speed and the conditionality of reforms left little room for the involvement of various groups and forms of civil society. Now that these states are full members of the EU, they should have more time for their own, domestically driven, reforms. It is time for real democratic deliberation and

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experimentation, which could usher in much needed institutional reforms in the region. Only a climate marked by strong political consensus and a broader involvement of civil society can help bring about the much-needed reform of liberal democracies in the region.

In his book *Dark Continent*, Mark Mazower shows that liberal democracy was not universally accepted as the normal and natural form of government in twentieth century Europe.[92] He explains that fascism and Nazism were not simply aberrant deviations in the otherwise steady growth of democracy in Europe, but deeply rooted and accepted ideologies which were able to compete with liberalism and socialism for political dominance in the European political landscape of the time. The rise of authoritarianism in Central and Eastern Europe is reminiscent of the dramatic events of Europe's most nightmarish century. Even if it is true that CEE democracies are not about to collapse, and even if the existence of the EU makes the danger of rising authoritarianism less dramatic, there are still reasons to be worried about authoritarian leaders' attack on liberal democracy. It is essential to liberal democracy that constitutional liberalism enjoys the same prestige and importance as "electoral democracy." Only when both elements of liberal democracy are working in unison can we speak of mature and consolidated liberal democracies.

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[92] Mark Mazower, Dark Continent: Europe's Twentieth Century (1998).